set a "grossly inequitable precedent: it would open the door for defendants to seek to keep the EEOC out of private litigation, and then try to preclude the EEOC—which may have more resources and effective legal representation, and therefore a better chance of winning at trial, than private plaintiffs do—from suing on its own." *Ibid.* Permitting such tactics would "severely curtail the enforcement powers of the EEOC and other governmental agencies by allowing the dismissal of their cases due to the result of litigation over which they have no control." *Id.* at 25-26.

ARGUMENT

The court of appeals held that the EEOC may "proceed with a Title VII enforcement action charging the defendant * * * with company-wide racial harassment, notwithstanding an adverse judgment rendered in a separate action brought by a number of individual plaintiffs who alleged racial harassment by the same defendant." Pet. App. 1. That holding is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), this Court held that the EEOC may litigate a claim of disability discrimination and seek victim-specific relief for an alleged victim of that discrimination even if the individual, having agreed to arbitrate his private claim against his employer, could not seek such relief in court himself. The Court reasoned that the EEOC's claim is not "merely derivative" of claims brought by private plaintiffs, nor is the EEOC "merely a proxy for the victims of discrimination." *Id.* at 297 (citing *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980)). Rather, Title VII authorizes the EEOC to bring its own

suit and to allege its own claim, which is separate from and independent of private claims challenging similar conduct by an employer; the statute "clearly makes the EEOC the master of its own case." See *id.* at 291. The Court recognized that, even when it sues seeking victim-specific relief, "it is the public agency's province * * * to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-292. "[I]f the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum." *Id.* at 292.[1]

Petitioner argues (Pet. 4) that the Eleventh Circuit's decision "conflicts" with this Court's decision in *Waffle House*. The Court in *Waffle House* stated that a plaintiff's conduct "may have the effect of limiting the relief that the EEOC may obtain in court" and the court directed federal courts to preclude "double recovery by an individual." 534 U.S. at 296, 297 (quoting *General Tel.*

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[1] This Court and others have held in a variety of other contexts that private suits do not preclude federal agencies with enforcement powers from bringing factually related claims. See, *e.g.*, *City of Richmond* v. *United States*, 422 U.S. 358, 373 n.6 (1982) (prior appellate judgment in Voting Rights Act case is not given estoppel effect in later suit by United States); *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1424-1425 (11th Cir. 1998) (Department of Labor not precluded from pursuing an ERISA claim despite a prior private suit), cert. denied, 525 U.S. 1140 (1999); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (same; holding that "Government is not barred by the doctrine of res judicata from maintaining independent actions to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462-1463 (5th Cir. 1983) (same), cert. denied, 467 U.S. 1251 (1984); *United States* v. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979) (Department of Justice not precluded from pursuing Voting Rights Act violation by prior resolution of a private claim).

Co., 446 U.S. at 333). Petitioner asserts (Pet. 5) that the decision in this case "allows the EEOC to obtain relief for the * * * *Thomas* plaintiffs," and that permitting such relief is inconsistent with *Waffle House*.

Nothing in the Eleventh Circuit's decision suggests any conflict with *Waffle House*. The Court in *Waffle House* did note that a charging party's "conduct may have the effect of limiting the relief that the EEOC may obtain in court." 534 U.S. at 296. But the Court also noted that "no question concerning the validity of [the charging party's] claim or the character of the relief that could be appropriately awarded in * * * a judicial * * * forum is presented by th[e] record" in *Waffle House*. *Id.* at 297. As the Court stated, "[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Ibid.* Similarly here, the court of appeals held that EEOC's enforcement action was not barred by the judgments in *Thomas*. As in *Waffle House*, questions of relief were neither presented to nor resolved by the court of appeals. See note 2, *infra*. This case accordingly presents no conflict with *Waffle House* on questions of relief.

2. Petitioner contends (Pet. 5) that further review is warranted to address what it contends is a conflict in the circuits on the question of "whether the EEOC is bound by a plaintiff's prior settlement and/or verdict when seeking the same relief on behalf of that individual."

a. This case does not present the question of whether the EEOC is precluded from bringing a Title VII enforcement action where the agency is seeking "the same relief" (Pet. 5) as was sought in a private suit. The EEOC in this case alleged company-wide racial harassment potentially affecting all of petitioner's 200 or more

African-American employees; the vast majority of those employees did not participate in *Thomas*. Although the *Thomas* suit was initially brought as a class action, plaintiffs withdrew their class claim after petitioner opposed class certification and proceeded on "individual plaintiffs consolidated in one action," each focused on relief for that particular plaintiff. Pet. App. 2. Thus, in addition to injunctive relief, the EEOC's suit seeks victim-specific relief for approximately 165 African-American employees who were not included in the *Thomas* suit and could not have obtained any relief from that suit no matter what the jury there had found. There is no theory under which the *Thomas* litigation would preclude litigation by those 165 individuals and no sound reason why the EEOC cannot litigate to vindicate the rights of those individuals.[2]

The courts of appeals are not divided on the question presented in this case. In the context of EEOC suits to enforce Title VII, the courts of appeals even before *Waffle House* had uniformly held that, at least where, as here, the allegations in an EEOC enforcement action are broader than those in a private suit based on the same charge, the EEOC is not bound by the resolution of the

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[2] In light of the procedural posture of this case, the Eleventh Circuit did not address the question whether and under what circumstances any of the *Thomas* plaintiffs could benefit from EEOC's enforcement action if and when liability is established. EEOC's action was dismissed even before discovery was complete. Compare Docket entry No. 52 (9/10/02 order extending discovery in EEOC's suit until 12/31/02), with Pet. App. 27 (granting summary judgment on 12/13/02). Assuming the trial is bifurcated, matters relating to relief may be deferred until after the trial on liability. At that time, should the EEOC prevail on the merits and decide to seek victim-specific relief for any *Thomas* plaintiff in addition to other injured African-American employees, petitioner will have ample opportunity to litigate that issue.

private suit such that its enforcement action may not proceed. See, *e.g.*, *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000) (decision in private suit to which EEOC is not a party "will not formally preclude the EEOC" in its parallel action), cert. denied, 531 U.S. 1127 (2001); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (EEOC may proceed in suit under Title VII and obtain injunctive relief even though charging party's claim for victim-specific relief was moot); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975) (after termination of charging party's private suit, EEOC may bring its own suit predicated on, but not limited to, the same charge); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361-1362 (6th Cir.) (same, adding that EEOC is not "privy" to private settlement to which it did not agree), cert. denied, 423 U.S. 994 (1975); cf. *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (ADEA case; EEOC may proceed with its suit on behalf of single individual and obtain injunctive relief even though individual was barred by prior suit from seeking victim-specific relief). Like the decision in this case, those cases recognize that precluding an EEOC enforcement action under such circumstances would be contrary to the key role Congress envisioned that the EEOC would play in enforcing federal discrimination law. See, *e.g.*, *Goodyear Aerospace*, 813 F.2d at 1542-1543; *Kimberly-Clark*, 511 F.2d at 1361 & n.12.

b. Petitioner errs in contending (Pet. 8) that *New Orleans Steamship Ass'n* v. *EEOC*, 680 F.2d 23 (5th Cir. 1982), suggests to the contrary. In that case, the Fifth Circuit held that "the EEOC may challenge a transaction which was the subject of prior judicial scrutiny in a private [Title VII] suit, *if the subsequent challenge seeks*

different relief." *Id.* at 25 (emphasis added). In this case, the EEOC indeed seeks broader (and therefore different) relief from that sought in the earlier private action. Accordingly, the Eleventh Circuit's holding in this case that EEOC may seek such relief is consistent with the decision in *New Orleans Steamship Ass'n*.[3]

The other cases cited by petitioner in support of its claim of conflict did not arise under Title VII, but instead arose under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* See Pet. 6-7 (citing *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990); *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)). In holding that the EEOC may not seek monetary relief that would be unavailable to specific victims, the courts in those cases relied on "the ADEA's distinctive scheme," which, according to those courts, makes the EEOC the "representative" of individual victims. *North Gibson Sch. Corp.*, 266 F.3d at 615 (stating that "the drafters of the ADEA consciously departed from the enforcement scheme of Title VII"); *United States Steel Corp.*, 921 F.2d at 494; see *id.* at 494 n.4 (stating that "the framers of the ADEA consciously departed" from "the enforcement scheme of Title VII"). The EEOC disagrees with that reasoning. But in any event, it does not extend to Title VII. As this Court held

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[3] In addition, *New Orleans Steamship Ass'n* was premised in part on the need to avoid duplicative litigation. See *Baker (Trucillion)* v. *King's Daughters Hosp.*, 614 F.2d 520, 524 (5th Cir. 1980), cited in *New Orleans Steamship Ass'n*, 680 F.2d at 25-26 & n.8. In light of the EEOC's repeated unsuccessful attempts to consolidate this case with *Thomas*, that rationale would not apply here. Indeed, it was petitioner's strenuous opposition to consolidation that essentially ensured that a separate trial would be required for EEOC's more comprehensive action.

in *General Tel. Co.* v. *EEOC*, 446 U.S. at 326, "[t]he EEOC is not merely a proxy for the victims of discrimination" under Title VII. Even "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Ibid.* The Seventh Circuit implicitly recognized that distinction in *Ameritech*, 220 F.3d at 821, where it held that the EEOC would not be bound by a judgment in a private Title VII case to which it was not a party. Accord *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (EEOC does not sue as representative of discrimination victims; "primary role is that of a law enforcement agency").

In any event, all of the cases relied on by petitioner predate this Court's decision in *Waffle House*. Since *Waffle House*, both the Fifth and Seventh Circuits have issued decisions indicating that, because of its interest in law enforcement, a federal agency such as the EEOC may obtain relief for a victim of discrimination even if that individual could not obtain the same relief himself. See *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003) (government is authorized to bring suit under Americans with Disabilities Act even though private suit would be barred by Eleventh Amendment, noting that government may determine whether public resources should be committed to recovery of victim-specific relief); *EEOC* v. *Board of Regents*, 288 F.3d 296, 299-300 (7th Cir. 2002) (same, under ADEA). Those rulings indicate that, contrary to petitioner's suggestion, those circuits would not disagree with the Eleventh Circuit's holding in this case.

3. Finally, petitioner argues (Pet. 11-12) that further review should be granted on what petitioner describes as an "issue of first impression" to ensure that

the EEOC is denied "a second chance to try a class-wide hostile environment claim based on the same evidence [the *Thomas* plaintiffs] unsuccessfully presented in an effort to prove the same work environment was hostile." The fact that, in petitioner's terms (Pet. 11), this case "will decide the preclusive nature of *twenty-two jury verdicts*" does not make it of sufficient general importance to warrant further review by this Court.

Even if it were less fact-bound, petitioner's claim that the *Thomas* litigation should have precluded this action would not warrant further review, because the court of appeals correctly held that, under any recognized theory, the EEOC was not in privity with the *Thomas* plaintiffs. See generally Pet. App. 5-25. Petitioner bases its privity arguments on the theories that the *Thomas* plaintiffs were the "virtual representative" of the EEOC and that the EEOC "assist[ed] in the prosecution or defense of [the *Thomas*] action." Pet. 13-14. This Court, however, flatly rejected similar attenuated notions of privity in *Richards* v. *Jefferson County*, 517 U.S. 793, 801-803 (1996), and *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167-168 (1999).

Although petitioner purports to rely (Pet. 13-14) on this Court's decision in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), that case is inapposite. *Montana* does not speak of "virtual representation" at all; given a federal agency's law enforcement interests, the theory is ill-suited to enforcement actions such as this one by the EEOC. See Pet. App. 17-25 (discussing case law). Nor was the EEOC's role in *Thomas* remotely comparable to the level of control or "assistance" exercised by the United States in *Montana*, where the Government required the original lawsuit to be filed in state court, reviewed and approved the complaint, paid the

attorney's fees and costs, directed the appeal to the Montana Supreme Court, appeared and submitted an amicus brief in the Montana Supreme Court, directed the filing of a notice of appeal to this Court, and effectuated the plaintiff's abandonment of that appeal when the Government filed its own suit in district court. See Pet. App. 16 (citing 440 U.S. at 155); compare Pet. App. 17 (EEOC did not sit at counsel table during trial in this case, examine witnesses, proffer evidence, or exert any control over decisions including what claims to assert and whether to appeal).

Moreover, as the court of appeals recognized, "the equities of this case * * * weigh strongly against a finding of privity." Pet. App. 25. In successfully opposing consolidation of this action with *Thomas*, petitioner argued that EEOC's action, claim and evidence were "substantially different" from those in *Thomas*. District docket No. 6 (Defendant's Response to EEOC's 1st Consolidation Motion 1-5). Further, petitioner informed the district court:

> The [*Thomas*] case consists of [a number of] individual cases filed together. Each of [these] Plaintiff's cases * * * must stand on its own merits. The EEOC's case is obviously much broader in that it does not allege that any particular employee has been subjected to a hostile environment. Instead, it alleges class-wide discrimination and opens the door to evidence that would be potentially wholly inadmissible in [*Thomas*].

District docket No. 30 (Defendant's Response to EEOC's 2d Consolidation Motion 3). In light of those arguments, petitioner should not now be heard to argue that the suits are so similar that this Court should inter-

cede to ensure that the EEOC may not try its action separately.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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